84-1267

Office-Supreme Court, U.S.
FILED
FEB 5 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

vs.

EDWARD NATHANIEL CARLTON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

JOHN D. O'HAIR
Wayne County Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

JEFFREY CAMINSKY (P-27258)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5836

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
4TH FLOOR, DETROIT, MICHIGAN 48226 (313) 964-3185

QUESTION PRESENTED

ABSENT A FORMAL REQUEST BY A DEFENDANT IN COURT AND ON THE RECORD, DOES THIS COURT'S HOLDING IN FARETTA v CALIFORNIA REQUIRE A TRIAL COURT TO HOLD A HEARING ON THE ISSUE OF SELF-REPRESENTATION?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

EDWARD NATHANIEL CARLTON,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting

Attorney for the County of Wayne, Edward Reilly Wilson, Deputy Chief, Civil and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on July 23, 1984, leave to appeal denied by the Michigan Supreme Court on December 19, 1984, one justice dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and appended below as Appendix A. Michigan Court of Appeals Docket No. 64060. The order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix B. Michigan Supreme Court Docket No. 74816.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on July 23, 1984. The Michigan Supreme Court entered judgment on December 19, 1984. This Court's jurisdiction is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

On November 26, 1980, Respondent was ordered to stand trial in Detroit Recorder's Court on charges of armed robbery and possession of a firearm in the commission of a felony. Respondent being indigent, appointed counsel represented him at the preliminary examination. On January 23, 1981, the trial court appointed Rufus Griffin as substitute counsel, to aid in Respondent's defense.

On February 22, 1981, Respondent sent a handwritten letter to the trial judge. This was the second of three handwritten letters he sent the judge during the

pendency of the case: the first, dated February 13, 1981, asked the judge's help in arranging a conference with his newly appointed attorney; the third, sent shortly before sentencing, dealt with matters germane to the imposition of sentence. This second letter read as follows:

Mr. Edward Carlton
525 Clinton St.
Ward 613
Detroit, Mich 48226
Feb 22, 1981

Honorable Craig Strong,

Dear Sir,

I am writing this letter to inform you that I have made contact

with Mr. Griffin. And we have discussed some very essential points regarding my case.

I would like to request the Honorable Courts permission to act as counsel in my up-coming trial, for several reasons and one particularly. (1.) I am the defendant in the case and I'm more familiar with my case than any other person involved.
(2.) I feel confident that I am capable of adquately defending myself, however I am not an attorney and neither am I totally familiar with all the court procedures. Although I feel I am capable of conducting my defense in an honorable fashion.

Before I close, I'd like to request the honorable courts aid in obtaining a copy the Detroit Police Dept's "Police Report" conduct by police officer's from the Twelfth Precinct, Mr. Gregory Taylor and Mr. Randolph Butler. It appears nearly impossible to obtain said document. Dated 11-16-80.

Thanking you as I remain respectful

/s/ EDWARD CARLTON

The record does not indicate whether or not the trial judge ever read Respondent's letter of February 22, 1981.

On December 4, 1980, a calendar conference was held in this matter,

before Judge Strong; the record shows that Respondent and original counsel attended, along with the assistant prosecutor. On December 18, 1980, a final conference was held in this matter, again attended by all principals, including Respondent, setting the case for trial on March 30, 1981.

Following substitution of counsel, motions filed by substitute counsel on Respondent's behalf of production of preliminary examination transcript, order of discovery, and partial suppression of criminal record were heard and granted on March 19, 1981. A second final conference, attended by Respondent, was held on June 4, 1981, setting a new trial date of August 24, 1981. Thereafter, various motions filed on Respondent's behalf were heard by the court on July

14, 1981, including motions to dismiss or alternatively to set personal bond, and to remand for a new preliminary examination. No hearing was held on the question of self-representation, either at the behest of Respondent, or on the court's own motion; and no mention was made on the record by anyone of Respondent's letter of February 22, 1981, or of the letter's contents.

On August 27, 1981, following a four-day trial, a jury convicted Respondent of armed robbery and possession of a firearm in the commission of a felony. On September 4, 1981, the trial court sentenced Respondent to eight-to-twenty years imprisonment for armed robbery, and two years on the firearm charge, the latter sentence running consecutively to the former.

On August 30, 1982, the Michigan Court of Appeals granted Respondent's application for delayed appeal. Following formal submission, the Court of Appeals reversed Respondent's conviction on July 23, 1984, holding that the trial court violated Respondent's constitutional right to self-representation by failing to take any action in response to his letter of February 22, 1981. The Court of Appeals remanded the case to the trial court for retrial.

On December 19, 1984, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal, one justice dissenting.

REASONS FOR GRANTING THE WRIT

A TRIAL COURT NEED NOT CONDUCT A HEARING ON THE QUESTION OF A CRIMINAL DEFENDANT'S EXERCISE OF HIS RIGHT TO SELF-REPRESENTATION UNDER FARETTA v CALIFORNIA ON ITS OWN MOTION, WHERE THE DEFENDANT'S SOLE MENTION OF ANY DESIRE TO REPRESENT HIMSELF COMES IN AN EX PARTE LETTER WRITTEN TO THE TRIAL JUDGE WHICH IS NEVER FOLLOWED BY A FORMAL REQUEST IN COURT.

In Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), this Court decreed that the Sixth Amendment[1] guaranteed an accused in a criminal case

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[1] US Const, Am VI.

the right to forego counsel and conduct his own defense, as well as the right to the assistance of counsel. The court reasoned that the right to the "assistance of counsel" -- and the rule of law binding a party by the actions of counsel[2] -- made it imperative that an accused consent to representation, or be free to conduct his defense personally:

> "Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It

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[2] Like many rules, this "rule of law" is more often honored in the breach than in the observance, particularly in the realm of criminal procedure.

> is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." Faretta v California, supra at 422 US 834. (Citation omitted).

However, it is clear that this right is not absolute: It is waived if not asserted unequivocally and in timely fashion, and may not be used as a means to obstruct the orderly administration of justice. Chapman v United States, 553 F2d 886 (CA 5, 1977). Moreover, the right is not self-executing, and the

defendant must affirmatively exercise it before complaining of its denial. The reason for this is explained succinctly in State v Fritz, 585 P2d 173; 98 ALR3d 1, 7 (1978):

> "Unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool. This right is afforded the defendant despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice." (Emphasis in original).

Thus, the states have generally adopted procedural rules requiring a defendant wishing to represent himself to make a formal request before trial, in order to invoke his right to self-representation under Faretta v California. As the California Supreme Court noted n People v Windham, 19 Cal 3d 121; 137 Cal Rptr 8; 560 P2d 1187, 1191 (1977):

> "The experience of other jurisdictions in dealing with the procedural implementation of a constitutionally based right of self-representation demonstrates that the requirement of a pretrial motion to that effect is a workable and appropriate predicate to the exercise of the Faretta right."

In this case, the Michigan Court of

Appeals reversed Defendant's armed robbery conviction on grounds that the trial court denied Defendant's constitutional right to represent himself at trial[3] by failing to order a hearing, after Defendant sent the court a letter suggesting that he wanted to represent himself. Such a failure does not constitute error, for nothing in the Constitution requires a judge to intrude

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[3] While the state court opinion speaks of the right of self- representation being guaranteed by both the state and federal constitutions, Petitioner's pleadings in the state courts clearly framed the issue in terms of federal law, and the underlying Michigan authorities acknowledge the preeminent standing of Faretta v California, supra. Since the state court did not issue a "plain

into an existing attorney-client relationship, absent a clear and unambiguous indication that the accused is dissatisfied with counsel, or wishes to represent himself. Moreover, authorities from other jurisdictions have held that a criminal defendant may not claim a Sixth Amendment violation under Faretta v California, where he fails to pursue the matter in open court prior to trial, and where he does in fact accept representation by appointed counsel. See, Bowen v State, 606 P2d 589 (Okla

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statement that a decision rests upon adequate and independent state grounds," this Court may assume that no such independent state grounds exist. Michigan v Long, 463 US ___; 103 S Ct 3469; 77 L Ed 2d 1201, 1215 (1983).

Crim, 1980). Since Michigan has found a violation of the constitutional right to self-representation in this case, despite Respondent's failure to assert the right in open court, this Court must resolve a conflict between the jurisdictions over the scope of its holding in Faretta.

Specifically, the question which this petition presents this Court is whether Michigan is correct in construing Faretta to impose an affirmative duty under the Constitution on the trial court in certain circumstances to inquire whether a criminal defendant wishes to represent himself, even if no formal request is ever made in court, or whether the rule in other jurisdictions requiring a formal motion conforms to Faretta's holding on the right to self-representation. Since Faretta itself merely proclaimed the Sixth Amendment right to self-

representation, while opening a host of procedural questions, such a conflict was inevitable; and this Court would aid the administration of criminal justice in courts throughout the country by clarifying the limits of the rights announced in Faretta.

Finally, and transcending Respondent's claim that the trial court abridged his rights under the Constitution, the fact remains that his request to represent himself came in an informal letter to the trial judge. Petitioner submits that a criminal defendant asserting the right to represent himself cannot claim that his ignorance of courtroom protocol is excusable, and that the Constitution views the lack of a formal motion as a trifling detail. Had the prosecutor -- or defense counsel -- attempted such an

ex parte communication with the trial judge, the state bar could have imposed professional sanctions, see, DR 7-110(B)(2), and the trial judge was well within his prerogatives in refusing to read the letter while the matter was still pending before him. See, Code of Judicial Conduct, Cannon 3(A)(4). Accordingly, the court's failure to order a hearing on matters contained in the letter cannot be error at all, much less one of Constitutional dimensions, for nothing in that document grants criminal defendants the right to engage in ex parte communications with the trial judge.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the Michigan Court of Appeals and hold that the Sixth Amendment does not require a trial court to hold a hearing on the question of self-representation in the absence of a formal motion by the defendant, and remand the cause for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

JEFFREY CAMINSKY
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5836

Dated: January 28, 1985
JC/rh

APPENDICES

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V JULY 23, 1984

EDWARD NATHANIEL CARLTON,
Defendant-Appellant.

Docket No. 70711

Before: Harold Hood, P.J., and M.J. Kelly and R.C. Livo*, JJ.

PER CURIAM

Defendant appeals by delayed leave, GCR 1963, 803.3, from jury convictions of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). Following his conviction, he was sentenced to a prison term of from 8 to 20 years on the armed robbery conviction and to the mandatory consecutive

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* Circuit Court Judge, sitting on the Court of Appeals by assignment.

two-year term on the felony-firearm conviction. We reverse and remand for a new trial.

Several months prior to trial, defendant submitted a letter to the trial court requesting that he be allowed to represent himself at trial. Trial counsel had been appointed on January 23, 1981. Defendant's letter, dated February 22, 1981, stated in relevant part:

> "I would like to request the Honorable Courts [sic] permission to act as counsel in my up-coming trial, for several reasons and one particularly (1) I am the defendant in the case and I'm more familiar with my case than any other person involved. (2.) I feel confident that I am capable of adequately

> defending myself, however I am not an attorney and neither am I totally familiar with all the court procedures. Although I feel I am capable of conducting my defense in an Honorable fashion."

As further evidence of defendant's intent to proceed in pro per, the letter ended with a request for trial court assistance in obtaining a copy of the police report relating the incident in question. According to the record, the trial court failed to take any action in response to the defendant's letter.

The right of self-representation in a criminal proceeding is guaranteed under the Sixth Amendment of the United States Constitution, Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562

(1975), as well as under Michigan Constitution, Const 1963, art 1 § 13, and Michigan statute, MCL 763.1; MSA 28.854. People v Holcomb, 395 Mich 326, 335; 235 NW2d 343 (1975).

In People v Anderson, 398 Mich 361, 367-368; 247 NW2d 857 (1976), the Michigan Supreme Court set forth the following rules governing requests by criminal defendants to proceed in pro per:

> "First, the request must be unequivocal. This requirement will abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they had been represented by counsel.
>
> * * *

"Second, once the defendant has unequivocally declared his desire to proceed pro se the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. The trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Defendant's competence is a pertinent consideration in making this determination. But his competence does not refer to legal skills, '[f]or his technical legal knowledge, as such, was not relevant to an assessment of his

knowing exercise of the right to defend himself'.

"The third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. The people would have us announce a guideline which would preclude the assertion of the right to proceed without counsel if it is not made before the trial begins. We cannot accede to this request. Although the potential for delay and inconvenience to the court may be greater if the request is made during trial, that will not invariably be the case." (citations omitted.

Even prior to the Supreme Court's decision in Anderson, it was well established that a criminal defendant's right to self-representation was triggered by an "unequivocal request". People v McMillan, 63 Mich App 309, 311; 234 NW2d 499 (1975); People v Hawkins, 34 Mich App 60, 62; 190 NW2d 723 (1971); lv den 385 Mich 780 (1971); People v Henderson, 30 Mich App 675, 679; 186 NW2d 844 (1971); People v Payne, 27 Mich App 133; 183 NW2d 371 (1970).

In this case, the prosecution argues that defendant's request was not unequivocal. We disagree and find that defendant's letter of February 22, 1981, states a clear and unequivocal request to proceed in pro per based on dissatisfaction with appointed counsel. Because defendant's request was made prior to the

commencement of trial, defendant's right to self-representation was absolute. People v Henley, 382 Mich 143, 148; 169 NW2d 299 (1969). The trial court erred in failing to respond to defendant's request, thus depriving him of a constitutional right. We must reverse on this basis.

Defendant also challenges on appeal the admission at trial of a revolver found in the stolen van. Defendant contends that the revolver had previously been suppressed as a product of an illegal search, resulting in the dismissal of the charge of carrying a concealed weapon. The record before us is insufficient to allow us to resolve this issue. In the event of retrial, however, defendant is not precluded from raising the issue again though it is the

defendant's burden to introduce evidence and to devolop a record sufficient to support his claim.

We further note that in the event of retrial, the trial court must instruct the jury in accordance with the rule announced in People v Lewis, 415 Mich 443, 454-455; 330 NW2d 16 (1982), regarding the felony-firearm charge.

Reversed and remanded.

/s/ Harold Hood

/s/ Michael J. Kelly

/s/ Robert C. Livo

ORDER OF THE MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of December in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 74816

COA: 64060

LC: 80-7826

EDWARD NATHANIEL CARLTON,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal to consider whether, in the absence of a record request, a defendant may successfully assert the right of self-representation.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court (seal) at Lansing this 19th day of December in the year of our Lord one thousand nine hundred and eighty-four.

/s/Jacqueline B. MacKinnon
Deputy Clerk